

**Perspectives of Rights and Challenges of Political Interests
in Conflict Resolution:
The Cases of Kosovo and Nagorno-Karabakh**

Tigran Torosyan*

Brusov State University
Center of Perspective Researches and Initiatives
(E-mail: head_humanrights@brusov.am, t.tigran@yahoo.com)

Abstract

During the last decades the fundamental improvement of international law in the sphere of rights has greatly increased the significance of the legal component in conflict regulation. At the same time, increasing globalisation has transferred a new quality to the struggle of powerful states for impact zones, thus stimulating the influence of the political component. As a result, conflict regulation has become an object of complex inter-disciplinary scientific studies. The Bargaining and Joint Problem Solving Paradigms traditionally used in conflict regulation are not efficient and the process of regulation lasts for decades. The people living in conflict areas continue to suffer, their rights are being violated, and sometimes the clashes resume with new force. In order to overcome conflict resolution crises it is necessary to fully evaluate the opportunities afforded by the legal and political components and review the regulation paradigm.

Keywords

International Law, Right of Self-Determination, political interests, mediation, Kosovo, Nagorno-Karabakh

* Tigran Torosyan is the Head of the UNESCO Chair on Human Rights, Democracy and European Studies at Brusov State University (Yerevan, Armenia), the Scientific Head of the Centre for Perspective Research and Initiatives, and the former President of the National Assembly of Armenia, a position he held from 2006-2008. He is a Doctor of Political Science and a PhD of Mathematical Sciences.

International Law: Vagueness of Terms or Large Room for Opportunities?

The main accomplishments of the first wave of the development of international law are considered² to be the ‘Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations’³ (Henceforth referred to as ‘the Declaration’) and the Helsinki Final Act of the Conference on Security and Cooperation in Europe⁴, adopted in 1975, both of which have great significance - especially from the aspect of the codification and implementation of the right to self-determination. As a result of this, in recent years the resolution of a number of self-determination conflicts (Eritrea, Eastern Timor, South Sudan, Kosovo) has been based on the right to self-determination. However, the attitudes of the more powerful states towards this important norm of international law are contradictory. When the United States, leading countries of the European Union (EU) and more than forty other states, recognised the independence of Kosovo in February 2008, Russia declared that this was in contradiction to international law. After exactly eight months a reverse situation occurred. Russia recognised the independence of Abkhazia and South Ossetia while the United States declared that it contradicted norms of international law. Moreover, neither Russia nor the US even tried to justify such a sharp change of position within just a few months.

According to some experts, a serious impediment to the implementation of the right to self-determination in conflict regulation is the vagueness of the terms used in international law. ‘Ethnic wars of secession highlight the inherent tension between “self-determination” and “sovereignty” or “territorial integrity”. One problem in developing coherent responses to such conflicts has been the vagueness of these terms.’⁵ However, it is interesting that it is often those pointing out such uncertainties that are behind their introduction. It is noteworthy that in cases of de-colonisation this is unequivocal, while contentious disputes surround cases that do not involve de-colonisation⁶, and it is sometimes considered that this right should be exercised only when a self-determining people are under the threat of a genocide⁷. It is easy to discover that the authors of such claims do not raise any arguments based on the norms of international law to ground

² A. Kuteinikov, ‘The Legal Norms of International Regulation: Waves of Unification’ (2003) 1 *International Trends*, 1(1), Available at: www.intertrends.ru/one_e.htm. Last accessed 4 September 2012

³ United Nations General Assembly Resolution 2625(XXV), 24 Oct. 1970

⁴ Conference on Security and Co-operation in Europe. Final Act. Available at http://www.osce.org/documents/cs/1975/08/4044_en.pdf. Last accessed 23 September 2012

⁵ H. Hannum, ‘The Specter of Secession: Responding to Claims for Ethnic Self-Determination’ (1998) *Foreign Affairs* (Hereafter *FA*), 77, 2, 13-18.

⁶ H. Hannum, n.5 above.

⁷ A. Buchanan, *Secession: The Morality of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991).

H. Hannum, n.5 above.

their views. Leaving aside the possible political context of such statements, a clear answer should be given to the question of whether international law has sufficient norms defining the implementation of the right to self-determination. Moreover, it should be noted that ‘(p)inciples and precedents of international law can play a large role in devising new formulas, but when international law standards are not clear or well-defined, varying perspectives can result in formulas being the source of conflict rather than its resolution’.⁸

Article 1.2 of Chapter I of the UN Charter considers equality and the right to self-determination as the basis for the achievement of one of the main goals of the organisation; namely the development of friendly relations among peoples. And Article 2.4, as one of the principles through which to reach these goals, considers the abstention from the use of force and threat of use of force in international relations towards the territorial integrity or political independence of any state. The International Bill of Human Rights defines the self-determination of peoples as a basic right without any reservation: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. ...the States Parties to the present Covenant... shall promote the realization of the right of self-determination and shall respect that right’.⁹ In the Declaration,¹⁰ seven principles of friendly relations and cooperation between states in the framework of international law were defined and codified. The right to self-determination is included in these seven principles, while territorial integrity is not. The Declaration lists territorial integrity as one of the six elements of the principle of the sovereign equality of states that regulates relations between member states and refers to the former as part of the definition of the latter. According to the definition, both the Charter and the Declaration consider territorial integrity to be *an element of regulating relations between member states*. Thus, member states do not have the right to violate each other’s territorial integrity, but are obliged to respect the right to self-determination (the right to freely determine their own political status) of the people living within their borders. These definitions already exclude the possibility of contradicting the right to self-determination with the principal of territorial integrity, since their implementation is foreseen for the regulation of different relations. The Helsinki Final Act¹¹ records that the participating states have agreed to respect and implement in practice ten principles for regulating relations among

⁸ S. J. Spector, ‘Negotiating Free Association between Western Sahara and Morocco: A Comparative Legal Analysis of Formulas for Self-Determination’ (2011) *International Negotiation*, 16, 1, 109–135.

⁹ The International Bill of Human Rights. Available at: www.un.org/cyberschoolbus/treaties/human.asp. Last accessed 07 September 2012.

¹⁰ United Nations General Assembly Resolution 2625(XXV), 24 Oct. 1970

¹¹ Conference on Security and Co-operation in Europe. Final Act. Available at:

http://www.osce.org/documents/cs/1975/08/4044_en.pdf. Last accessed 23 September 2012.

themselves, including that of Territorial Integrity (IV) and the Equal Rights and Self-Determination of Peoples (VIII). At the same time, the Helsinki Final Act states that ‘all of these principles are of primary importance’, meaning that the act does not prioritise the fourth, eighth, or any other principles. The definition of the act with regard to Principle IV is very clear: ‘*The participating States* will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force’.¹² The definition clearly states that the principle of territorial integrity applies to relations between the states participating in the declaration, and that in this framework states agree to respect the immunity of the borders and territorial integrity of each other. The implementation of the right to self-determination, however, has nothing to do with the issue of relations between states. It concerns the processes taking place within a single state, where one of the sides is a recognised state and the other side is another entity – a people seeking to implement its right. Hence, the Helsinki Final Act is not contradictory. The same approaches embedded in the UN Basic Documents are reflected here in a more concise form.¹³ According to Professor M. Weller,¹⁴ many experts confirm that under the UN Charter, the principle of territorial integrity is employed only in relations between recognised states. In 2010, the International Court of Justice (ICJ) put an end to debate concerning the apparent contradiction between the right to self-determination and the principle of territorial integrity. Referring to the UN Charter, the Declaration and the Helsinki Final Act, the ICJ stated that ‘(t)he scope of the principle of territorial integrity is confined to the sphere of relations between States’.¹⁵

Thus, the basic documents of international law clearly state that the principle of territorial integrity and the right to self-determination regulate completely different relations, and that, as such, there is no contradiction between these norms. However, some experts¹⁶ argue that the right to self-determination prevails over territorial integrity, but that when viewing the relationship between these two norms ‘(n)either sovereignty (territorial integrity) nor self-

¹² Conference on Security and Co-operation in Europe. Final Act, n.11 above.

¹³ T. Torosyan, ‘Imaginary Contradiction’ (2007) *Russia in Global Affairs*, 4, October – December, 168-179.

¹⁴ *Kosovo: The ICJ Opinion - What Next?* Summary of the International Law Discussion Group meeting held at Chatham House on Tuesday, 21 September 2010.

¹⁵ Accordance with International Law of the unilateral Declaration of Independence in Respect of Kosovo. ICJ Advisory Opinion, 22.07.2010, par 80.

¹⁶ V. Gudeleviciute, ‘Does the principle of self-determination prevail over the principle of territorial integrity?’ (2005) *International Journal of Baltic Law*, 2, 2, 48-74.

O. Luchterhandt, *Nagorny Karabakh’s Right to State Independence according to International Law* (Boston, 1993).

determination is an absolute right'.¹⁷ With this in mind, it is important to explore the status of the right to self-determination as a norm of international law.

The Right to Self-Determination: The Status and Modes of Implementation

In order to clarify the status of the right to self-determination within the framework of international law, the decisions and opinions of the ICJ are of essential significance. In paragraph 29 of its 1995 decision on the East Timor conflict, the ICJ acknowledged the right to self-determination as a norm of *erga omnes* (meaning *in relation to everyone, or towards all*) nature:

‘In the Court’s view, Portugal’s assertion that the right of peoples to self-determination - as it evolved from the Charter and from United Nation practice – has an *erga omnes* character and is irrefragable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court¹⁸... it is one of the essential principles of contemporary international law.’¹⁹

The ICJ has also referred to the right to self-determination as an *erga omnes* norm on subsequent occasions, for example, in its Advisory Opinion concerning the Palestine issue.²⁰ The Inter-American Commission on Human Rights, when discussing²¹ cases concerning the right to self-determination, recorded that this right has the legal status of *erga omnes*, (i.e. the right to self-determination is a norm, respect for which is mandatory for all UN Member States without any reservations.) The Institute of International Law adopted a resolution²² in 2005 that formulates the obligations of states arising from the *erga omnes* status of international legal norms. Not only does this resolution confirm the prohibition of genocide, aggression, basic human rights and the right of peoples to self-determination as basic values with *erga omnes* status, it also highlights the obligation of other states to unconditionally respect those norms as well as the rights of the states to manifest appropriate position and take measures consistent with the UN Charter towards the countries that do not respect these norms.

¹⁷ H. Hannum, n.5 above.

¹⁸ ‘Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)’, *Advisory Opinion, ICJ Reports*, 1971, at 31-32, paras. 52-3; ; ‘Western Sahara’, *Advisory Opinion, ICJ Reports* (1975), at 31-33.

¹⁹ ‘East Timor (Portugal v. Australia). Judgment,’ *International Court of Justice Reports* (1995) at 102. Available at: http://www.icj-cij.org/icjwww/icasess/ipa/ipa_ijudgments/ipa_ijudgment_19950630.pdf. Last accessed 25 August 2012

²⁰ ‘Legal consequences of the construction of a wall in the occupied Palestinian territory’, *Advisory Opinion, ICJ* (09.07.2004, No 131).

²¹ Inter-American Commission on Human Rights, Organization of American States, Press Communique No. 13/93 (May 25, 1993).

²² ‘Resolution Obligations *erga omnes* in International Law. Session 2005, Fifth Commission’, *The Institute of International Law*.

The ICJ also considers²³ the right to self-determination a *jus cogens* (meaning ‘compelling law’) norm²⁴. The highest legal status of this norm is reflected in Articles 53 and 64 of the Vienna Convention on the Law of Treaties.²⁵ According to Article 53, *jus cogens* ‘is a norm accepted and recognized by the international community of States as a norm from which no derogation is permitted’. This means that the right to self-determination is a mandatory norm of basic international law. As such, no state can consider itself free of this norm or free another state from it, unlike *jus dispositivum* norms of international law, which take effect for a party only when this party agrees to undertake obligations under such a norm under an international treaty. Moreover, according to Vienna Convention on the Law of Treaties, any existing ‘treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*)’ or ‘if a new peremptory norm (*jus cogens*) of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates’. Thus, it is evident that the right to self-determination is an absolute norm of international law and cannot be affected by any restriction, including those arising from the principle of territorial integrity. What is left to clarify then, are the possibilities for implementation of the right to self-determination.

The Declaration including provisions on the codification of the equality of nations and the right to self-determination irrefragably and clearly defines the modes and mechanisms of the implementation of this right. Firstly, the Declaration records that,

‘(b)y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this rights in accordance with the provisions of the Charter’.²⁶

Further, the modes of implementation of the right to self-determination are clearly defined: ‘(t)he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people

²³ Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa), n.18 above.

²⁴ A.P. Rubin, ‘Actio Popularis, Jus Cogens and Offenses Erga Omnes?’ (2001) *New England Law Review*, 35, 2, at 265-280.

²⁵ Vienna Convention on the Law of Treaties, 23 May 1969.

²⁶ Declaration on Principles of International Law concerning Friendly Relations... n.3 above.

constitute modes of implementing the right of self-determination by that people”²⁷ It follows from these two definitions that it is the self-determining people that decide which political status they want to choose from the aforementioned options, and all states not only lack the right to hinder to this process, but, moreover, according to the Declaration, have ‘the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter’.²⁸ Moreover, the Declaration clearly warns the member countries that ‘(e)very State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence’.²⁹ Obviously, the states that practice violent actions towards the people that have expressed an intention to implement their right to self-determination are breaching the norms of international law and these people have the right not only to resist, but also to receive support for this objective.

Thus, there is no contradiction between territorial integrity and the right to self-determination - which has status of a highest legal norm (*erga omnes* and *jus cogens*) - and when exercising the latter, secession is not an extraordinary case, but only a result of the implementation of this right by the self-determining people freely chosen from the four possible aforementioned modes. The Declaration does not leave any uncertainty regarding the exercise of this right. Of course, the Declaration could not refrain from affording special mention to perhaps the most remarkable process of the time: de-colonisation, in which the implementation of the right to self-determination was the most significant tool. However, it is clear from this document that de-colonisation is viewed only as a distinct manifestation ‘of having due regard to the freely expressed will of the peoples concerned’ and ‘subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter’.³⁰

The UN General Assembly periodically reconfirms the right to self-determination by accepting a number of resolutions under the title of the Universal Implementation of the Nations Right of Self-Determination. In particular, in the resolution adopted on February 14, 2006, the UN General Assembly ‘(r)eaffirms that the universal realization of the right of all peoples, including

²⁷ Declaration on Principles of International Law concerning Friendly Relations... n.3 above.

²⁸ Declaration on Principles of International Law concerning Friendly Relations... n.3 above.

²⁹ Declaration on Principles of International Law concerning Friendly Relations... n.3 above.

³⁰ Declaration on Principles of International Law concerning Friendly Relations... n.3 above.

those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights'.³¹

The Conclusion of the UN Secretariat, which was prepared by the UN Legal Affairs Office, is also clear and comprehensive. It records that

'the practice of the United Nations, both at the level of elaboration of general principles and at the level of concrete implementation of those principles, has established that statehood is a legitimate mode of implementation of the right of self-determination. Statehood has even emerged as the most common and thus normal form of self-determination and the General Assembly cannot be expected to accept any other form unless the peoples choosing a status different from independent statehood do so notwithstanding that independent statehood is a clearly available alternative'.³²

It is clear that exercising the right to self-determination does not have any limitations within the framework of international law, and that self-determining people have the right through free expression of will to choose one of the following four options:

"The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people".³³

However, at the time of conflict resolution, the first attempt to be solve the problem is via negotiation - through the alignment of interests, with mediation playing a significant role.

Mediation: Efforts and Interests

In the last quarter of the past century one of the most important shifts in the area of conflict resolution has been a significant increase in mediatory interferences. The operation of UN and OSCE mediatory missions is especially important since, according to the UN Charter, it is exactly these organisations that have such a mandate. Although the implementation of mediation

³¹ Universal realization of the right of peoples to self-determination. UN Doc. A/RES/60/145, 14 February 2006. Available at: <http://www.un.org/Depts/dhl/resguide/r60.html>. Last accessed 7 September 2012.

³² *United Nations Juridical Yearbook 1980* (N.Y., 1981) at 182-183.

³³ Declaration on Principles of International Law concerning Friendly Relations... n.3above.

is extremely important as one of the principal factors for the establishment and maintenance of peace, the efficiency of mediation still needs serious improvement, since the processes of regulation have, in a significant number of conflicts, lasted for decades.

From the point of view of the assessment of the efficiency of mediation, study of the essence of mediation revealing diverse aspects of this phenomenon is especially important. Traditionally, mediation is viewed as a peaceful interference by a third party, aimed at solving the conflict through negotiations leading to a resolution that is acceptable to all sides.³⁴ According to Zartman and Touval³⁵, mediation is ‘a mode of negotiations in which a third party helps the parties find a solution which they cannot find by themselves’ since usually there is no contact between the conflicting sides. This is why, according to Fridl, the aim of mediation is ensuring communication between conflicting parties, exploring options, developing efficient formulations, eventually leading to mutually acceptable agreements.³⁶ Touval and Zartman consider³⁷ the role of mediation to be more active. According to them, mediators help the conflicting sides to communicate and attempt to change their perceptions of each other by proposing mutual compromises and signing a deal attempting to compel the sides to change their positions and suggest compromises. However, the study of mediation suggests that the conflicting sides and the mediating side have to conduct ‘interest calculation that involves much more than the simple settlement of the dispute’,³⁸ since the desire of the mediators to solve the conflict is merged with other motivations. The mediators have two objectives – in addition to the humanitarian goal, they also seek to increase their own influence.³⁹ Of course, they want to achieve the final solution of conflict and establish irreversible peace, but they are also pushing forward their own interests. Therefore, certain deviation from impartiality is always possible when it comes to the interests of the mediators.⁴⁰ From the point of view of the interests of the conflicting sides, this can have both positive and negative consequences.

³⁴ J. Bercovitch, T. Anagnoson and D. L. Wille, ‘Some conceptual issues and empirical trends in the study of successful mediation in the international relations’ (1991) *Journal of Peace Research*, 28, 1, 7-17.

J. Bercovitch and K. Derouen, ‘Mediation in Internationalized Ethnic Conflict: Assessing the Determinants of a Successful Process’ (2004) *Armed Forces and Society*, 30, 2, 147-170.

³⁵ I. W. Zartman and S. Touval, ‘International Mediation in the Post-Cold War Era’ in C. Crocker, F. Hampson and P. Aall (eds.), *Managing Global Chaos* (Washington D.C.: United States Institute of Peace Press, 1996) at 446.

³⁶ D.D. Fridl, ‘Kosovo Negotiations: Re-visiting the Role of Mediation’ (2009) *International Negotiation*, 14, 1, 71-93.

³⁷ S. Touval and I.W. Zartman (eds.), *International Mediation in Theory and Practice* (Boulder and London: Westview Press, 1985), at 7.

³⁸ I. W. Zartman and S. Touval, n.35 above. At 460.

³⁹ S. Touval and I. W. Zartman (eds.), n.37 above.

⁴⁰ S. Touval and I. W. Zartman (eds.), n.37 above.

At the same time, the involvement of mediators is not only a challenge for conflict resolution, but also another opportunity to achieve a solution that is consistent with the interests of the conflicting sides. This opportunity, especially for the weaker side during international negotiations, is noted by a number of researchers. According to them, the weaker side can ‘augment its power through skillful tactics, resource mobilization, *third parties*, and a variety of other devices’.⁴¹ Among these devices, the full use of the resources of international law is especially significant. This is also applicable in those cases where mediators try to defend their interests by pushing the process out of the framework of international law. At the time of international mediation the mediators are rarely indifferent to the conditions that are the subject of the negotiations and usually try to avoid conditions that do not correspond to their own interests.⁴² Mediators ‘seek terms that will increase the prospects of stability, deny their rivals opportunities for intervention, earn them gratitude of one or both parties, or enable them to continue to have a role in future relations in the region’.⁴³ In order to reach these aims during negotiations, mediators implement levers indirectly connected to conflict resolution, and sometimes even approaches and mechanisms that hinder the resolution. Though the involvement of mediators is often inevitable, this involvement brings to the resolution process the additional factor of mediator interests, which inevitably complicate the solution. Thus, it is apparent that in cases of interference or mediation by a third party, a new substantial factor (the mediator’s interests) is added, and this interest may differ from the interests of one or both of the conflicting parties. This factor may have an especially significant influence on the resolution process when the influential countries mediate—particularly when they have conflicting and sensitive interests in the region. Powerful mediating states may attempt to influence the negotiation outcome for the sake of their own interests rather than pursue the interests of the conflicting sides.⁴⁴ Therefore, the efficiency of mediation greatly depends both on the group of the mediating sides and the number of mediating states involved. Unilateral mediation from the point of view of the outcome of negotiations is more efficient than multilateral mediation, but at the same time, from the point of view of balancing the influence of the mediators, multi-sided mediation is preferable. Thus, from the aspect of evaluation of mediation, the interests and the composition of the mediating group are especially important, and from the point of view of balancing these interests the intellectual resources of the sides are important as well.

⁴¹ I. W. Zartman and J. Rubin, *Power and Negotiation* (Ann Arbor: The University of Michigan Press, 2000), at 257 (my emphasis).

⁴² I. W. Zartman, *Negotiation and Conflict Management: Essays on Theory and Practice* (London and New York: Routledge Taylor & Francis Group, 2008) at 156.

⁴³ I. W. Zartman, n.42 above.

⁴⁴ P. T. Hopmann, *The Negotiation Process and the Resolution of International Conflicts* (Columbia, SC: University of South Carolina Press, 1996).

Case Study: Kosovo and Nagorno-Karabakh

Comparative analysis is often employed in conflict research.⁴⁵ Comparative analysis of the Nagorno-Karabakh and Kosovo conflicts is particularly interesting from the point of view of the impact of mediation on the conflict resolution process. The Nagorno-Karabakh⁴⁶ and Kosovo⁴⁷ cases are both cases of self-determination conflicts and have a number of common features from legal and documentary perspectives.⁴⁸ Both have been considered as intractable.⁴⁹ At the same time, from the geopolitical point of view and in terms of mediation impact, these conflicts differ significantly. In both cases the metropolis unleashed war after the self-determining people declared their intention to acquire independence,⁵⁰ but in the case of Nagorno-Karabakh the

⁴⁵E. F. Babbitt, 'Rights-Based Conflicts: Making Self-Determination Negotiable' (2006) *International Negotiation*, 11, 2, 185-208.

I. Busiguina, 'Northern Ireland and Chechenia: some parallels' (1996) *Mirovaya ekonomika i mejdunarodnie otnosheniya*, 11, 109-113.

K. Ploss, 'Beyond the Meeting: How Community Activists Construe Idea Transfer from Intercommunity Encounters- The Cases of Northern Ireland and Kosovo' (2011) *International Negotiation*, 16, 1, 319-346.

G. Starovoitova, *Sovereignty after Empire. Self-Determination Movements in the Former Soviet Union*. (Institute of Peace (USA), 1996).

T. Torosyan, 'Kosovo and Nagorno-Karabakh: the Comparative Analysis of the Conflicts and Processes of their resolution' (2010) Available at <http://www.regnum.ru/news/1317218.html>. Last accessed 22 August 2010.

⁴⁶ E. F. Babbitt, n.45 above.

O. Luchterhandt, *Nagorny Karabakh's Right to State Independence according to International Law* (Boston, 1993).

Statement by the OSCE Minsk Group Co-Chair countries, L'Aquila, 10 July 2012. Available at:

www.osce.org/item/38731.html. Last accessed 11.07.2009

Statement by the OSCE Minsk Group Co-Chair countries, Muskoka, 26 Jun 2012. Available at:

www.osce.org/item/44971.html. Last accessed 27.06.2010.

Joint statement on the Nagorno-Karabakh Conflict, by the Presidents of the OSCE Minsk Group Co-Chair Countries at the G-8 Summit, Deauville, 26 May 2011. Available at: www.osce.org/mg/78195.html. Last accessed 27 May 2011.

Joint Statement by the Presidents of the United States, the Russian Federation and France on Nagorno-Karabakh, Los Kabos, 19 June 2012. Available at: www.osce.org/mg/91393, Last access 20 June 2012.

T. Torosyan, 'Imaginary Contradiction' (2007) *Russia in Global Affairs*, 4, October – December, 168-179.

⁴⁷ Accordance with International Law of the unilateral Declaration of Independence in Respect of Kosovo, n.15 above.

T. Torosyan, *Conflict Resolution in the Framework of the International Law: The Case of Nagorno- Karabakh* (Tigran Mets, Yerevan, 2010).

⁴⁸ T. Torosyan, 'Kosovo and Nagorno-Karabakh: the Comparative Analysis of the Conflicts and Processes of their resolution' (2010) Available at: <http://www.regnum.ru/news/1317218.html>. Last accessed 22 August 2010.

⁴⁹S. L. Burg, 'Intractability and Third-Party Mediation in the Balkans' in Ch.Crocker, F. Hampson and P. Aall (eds.), *Grasping the Nettle: Analyzing Cases of Intractable Conflict*. (Washington, DC: USIP Press, 2005), 183-207.

P.T. Hopmann and I. W. Zartman, 'Overcoming the Nagorno-Karabakh Stalemate' (2010) *International Negotiation*, 15, 1, 1-6.

⁵⁰ C. Cox and J. Eibner, *Ethnic Cleansing in Progress: War in Nagorno-Karabakh* (Zurich, London and Washington, 1993).

P. W. Gor, *'Tis some poor fello's skull: Post-Soviet Warfare in the Southern Caucasus* (Lincoln, 2008).

I. King and W. Mason, *Peace at any Price* (London, 2006).

G. Starovoitova, *Sovereignty after Empire: Self-Determination Movements in the Former Soviet Union*. (Institute of Peace (USA), 1996).

ceasefire was achieved in 1994 without the interference of peacekeeping forces, while in Kosovo the same was only achieved in 1999 through NATO military interference. If, after said military interference, the issue of geo-political orientation became definite in the Balkans, in the South Caucasus after the five-day Georgian war of 2008 the struggle for the acquisition of political impact zones⁵¹ became more intense and is still in process.⁵² The difference in the composition of the group of mediators and the strategies they implement arrive as a result of this difference in circumstances. It is true that, according to the tradition of the 1990s, conflict-regulation conferences were formed for both Nagorno-Karabakh⁵³ and Kosovo⁵⁴, but they had a significant difference. In the case of Nagorno-Karabakh, together with the United States and France, Russia became one of the co-chairing countries of the conference (the OSCE Minsk Group), in the case of Kosovo, however, the co-chairs of the conference were the European Union and the United States, with the US later taking sole management of the regulation process. It is obvious that in the first case, the interests of three mediating sides are quite divergent; '(u)nfortunately, to date the collective mediation effort has also been undermined in part by divisions among the three central mediating states, namely France, Russia, and the United States, about possible solutions to the problem and their divergent interests regarding the nature of a solution'.⁵⁵ It is noteworthy that, although in the beginning there were two mediating co-chairs dealing with the regulation of the Kosovo conflict and they were representing countries that had almost no conflict of interests in the geo-political context, they could not manage to ensure any positive development.

From the point of view of the conflict solution, the circumstances surrounding the change of the resolution strategy for the Kosovo conflict is especially noteworthy. In the beginning, the motto, 'First Standards, Then Status' was chosen for the resolution. The 'Standards for Kosovo' project was then instated, but when the armed clashes re-commenced in 2004, causing new victims and forceful migration, the strategy was abruptly changed, and the issue of defining Kosovo's status became the priority. This was completely logical since, in self-determination conflicts, the issue of the determination of status is the priority; all other issues are merely consequences resulting from it. The Kosovo case clearly demonstrates that the sequence of points in the Resolution Agenda is important, and deterioration of such logic can lead to crisis, and even the recommencement of violence. Of course, representatives from the EU⁵⁶ and United States⁵⁷

⁵¹ Z. Brzezinski, *The Choice: Global Domination or Global Leadership* (Perseus Books Group, 2004).

⁵² T. Torosyan, 'The Return of Turkey' (2009) *Russia in Global Affairs*, 3, July-September, at 120-129.

⁵³ T. de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War* (New York and London, 2003)

⁵⁴ S. L. Burg, n.49 above.

⁵⁵ P.T. Hopmann and I. W. Zartman, n.49 above.

⁵⁶ X. Solana, 'Kosovo is a unique case' (2008). Available at

publicly maintain that Kosovo is an exceptional and unique case, but they have been able to provide a logical justification for such a position.⁵⁸ Moreover, although the author of the idea of recognition of Kosovo's independence, Special Representative of UN Secretary General M. Ahtisaari, has referred to this in his report⁵⁹ on its implementation, it is noteworthy that there is no reference to this in the ICJ Advisory Opinion⁶⁰. Comparative analysis of the cases of Kosovo and Nagorno-Karabakh unequivocally confirms that the Kosovo case has no relevant unique features when compared to the Nagorno-Karabakh case. On the contrary, the study⁶¹ reveals that the differences between these two conflicts are due, not to the facts of the conflicts, but to the geopolitical interests of the mediating states, the strategies they employ and the negotiation process. The other difference is due to the format of the respective negotiations. If, in the case of Kosovo, the negotiations corresponded to the appropriate format of the conflict, in case of Nagorno-Karabakh this format has deteriorated. According to the co-chair of OSCE Minsk Group, B. Fassier⁶², the Nagorno-Karabakh conflict is a complex one and is comprised of two conflicts. The first is an inter-state conflict between Armenia and Azerbaijan. The second is a self-determination conflict between Azerbaijan and Nagorno-Karabakh. This is testified to, not only by a number of experts⁶³, but also by four joint declarations⁶⁴ of the presidents of the co-chairing states. They state that the conflict should be solved based on the three principles of the Helsinki Final Act, which are: self-determination, territorial integrity and refraining from the threat or use of force. This was the principal shift recorded in November 2007 in Madrid within the framework of the negotiation process. Currently, only Armenia and Azerbaijan are participating in the negotiation process. The problem with this is obvious. For which of these states will the right to self-determination be exercised? Gross deterioration from the essence of the right to self-determination is one of the main reasons for the conflict, as consequence of

<http://news.trend.az/cgi-bin/readnews2.pl?newsId=967342>. Last accessed 27 July 2009.

⁵⁷ *Adopting consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue*. Available at www.un.org/News/Press/docs/2010/ga10980.doc.htm. Last accessed 23 September 2012

⁵⁸ T. Torosyan, n.48 above.

⁵⁹ Report on Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168, 26.03.2007.

⁶⁰ Accordance with International Law of the unilateral Declaration of Independence in Respect of Kosovo, n.15 above.

⁶¹ T. Torosyan, 'Kosovo and Nagorno-Karabakh: the Comparative Analysis of the Conflicts and Processes of their resolution', n.48 above.

⁶² R. Gabiboglu, *The Co-Chairmen Consider the Karabakh Conflict as an Inter-State Dispute*. Available at www.zerkalo.az/print.php?id=29184. Last accessed 14 July 2008.

⁶³ E. F. Babbitt, 'Rights-Based Conflicts: Making Self-Determination Negotiable' (2006). See footnote 45. O. Luchterhandt, n.16 above.

T. Torosyan, n.47 above.

⁶⁴ Statement by the OSCE Minsk Group Co-Chair countries, n.46 above.

Joint statement on the Nagorno-Karabakh Conflict, by the Presidents of the OSCE Minsk Group Co-Chair Countries at the G-8 Summit, n.46 above.

Joint Statement by the Presidents of the United States, the Russian Federation and France on Nagorno-Karabakh, n.46 above.

which, the process of regulation of the Nagorno-Karabakh conflict has lingered for more than two decades and has reached a stalemate.⁶⁵ The existence of such a situation is demonstrated by comparative analysis of the three aforementioned declarations of the three presidents and declarations of the co-chairs of the Minsk Group. Over a period of four years these documents record the same principles and elements for regulation and urge the conflicting sides to take the final step (i.e. to agree to a solution to the remaining issues). In the interim, the declarations have not recorded any concrete change in the situation. Moreover, in 2008 the Foreign Minister of Russia (one of the co-chairing countries), S. Lavrov, noted⁶⁶ that the negotiations are being carried out based on the Madrid Principles (three principles of the Helsinki Final Act and six elements of conflict solution), and that there are only one or two issues left to settle (including that of the status of Nagorno-Karabakh). As was the case for Kosovo until 2005, procrastination over the definition of status has led the negotiations to an impasse. Of course, during 2008-2011, there were several occasions when optimistic opinions were expressed regarding the possibility of signing a document confirming the basic principles of the resolution. However, since in the last two decades both in Azerbaijan and Armenia as well as in Nagorno-Karabakh itself, the question of ruling authorities was solved in the context of the conflict, it is apparent that President of Azerbaijan will not sign any document that assumes the right of Nagorno-Karabakh to self-determination with the possibility of succession, and, obviously, the President of Armenia will not sign a document that does not involve such an opportunity. Therefore, it is possible to ensure the signing of a negotiation document if the document has such an unclear formulations on the status of Nagorno-Karabakh that both sides can interpret it as they wish. It seems as though the mediators have found a way out. They suggest that the parties concerned should begin by signing a document on basic principles of regulation and then clarify the details at the time of the development of a peace treaty. However, the signing of such a document will give no real result from the point of view of conflict resolution. Rather, it will artificially launch a new phase, i.e. the phase of the development of a peace treaty, and the stalemate situation will simply move to this new phase. It should not be forgotten that in the past the negotiations have failed even in the last minute. This was the case in 2001 in Key West, after having agreed all issues between the Presidents of Armenia and Azerbaijan and having final text of the treaty. The President of Azerbaijan of that time, Heydar Aliev, did not manage to persuade his inner circle back home that the deal afforded them adequate compensation, namely the 'Nakhijevan Corridor', in return for passing the territory of Nagorno-Karabakh to the jurisdiction of

⁶⁵ T. Torosyan, 'The Nagorno-Karabakh Conflict: Deauville-Kazan- "Zurich-2"?' (2011). Available at <http://www.regnum.ru/news/1414859.html> Last accessed 14.06.2011.

⁶⁶V. Vorobyov, 'The key to the diplomat' *Rossiyskaya gazeta*, No 4766, 7 October 2008.

Armenia.⁶⁷ After several resignations of senior officials, Aliiev announced that Azerbaijan would not sign the preliminarily agreed upon draft of the treaty. It is often mentioned that the two sides have never been closer to reaching a solution as they were after the agreement reached in Key West.⁶⁸ This, however, is a misleading claim, since even in this case neither side had the necessary arguments for persuading the people on whose behalf the negotiations have been carried out that the resolution should be accepted. This was due to the fact that the paradigm on which the Key West deal was based was the Bargaining Paradigm.

Thus, the main differences between the conflict resolutions for Kosovo and Nagorno-Karabakh are due to differences in the operation of mediatory missions:

1. The conflicting geo-political interests of Russia and the United States in the South Caucasus,
2. The absence of the self-determining people, i.e. Nagorno-Karabakh, in the negotiation process,
3. The breach of logic in the sequence of the discussion of agenda issues in the negotiations over Nagorno-Karabakh and the procrastination over the definition of status.

Thus, in order to resolve the current stalemate, steps must be taken to overcome the three obstacles mentioned above.

Of course, the mediators can insist that while they have been 'neutral with respect to the values and claims of the combatants, the activity of mediating is still a declaration of values held by the mediator'.⁶⁹ In the case of Nagorno-Karabakh, although the mediators took an important step towards the resolution back in 2007 by declaring three principles of Helsinki Final Act to be the basis of the process, they later deviated from this and because of the deteriorated format of negotiations and incorrect choice of the sequence of agenda issues, the negotiations have reached a stalemate. The reason is the over-estimation of the Bargaining Paradigm⁷⁰ used in negotiation. In general, this paradigm is widely used in various negotiations, but it has low efficiency - especially for intractable conflicts - as it does not take into consideration the peculiarities of self-determination conflicts. For this paradigm to be implemented, either full agreement of the sides

⁶⁷ T. Ziyadov, 'Nagorno-Karabakh Negotiations: Through the Prism of a Multi-Issue Bargaining Model' (2010) *International Negotiation*, 15, 1, at 107-131.

⁶⁸ T. Ziyadov, 'Nagorno-Karabakh Negotiations: Through the Prism of a Multi-Issue Bargaining Model', n.67 above.

⁶⁹ K. Webb, 'Morality of Mediation' in C.R. Mitchell and K. Webb (eds.), *New Approaches to International Mediation* (Westport, CT: Greenwood Press, 1988) at 16.

⁷⁰ P. T. Hopmann, 'Two Paradigms of Negotiation: Bargaining and Problem Solving' (1995) *Annals of the American Academy of Political and Social Science*, vol. 542 (Flexibility in International Negotiation and Mediation), 24-47.

or correspondence of the process to the norms of the international law is required. In the absence of the former, the latter becomes mandatory since it is the only remaining possibility for a solution.

New Paradigm

One of the main characteristics of intractable conflicts is their long-lasting nature. This not only maintains the tension and hinders the establishment of normal relations, but may also lead to undesirable consequences - from breaches of ceasefire to the re-commencement of war. At the same time, it is desirable to have a solution which is satisfactory for all sides. However, in conflicts regarding the right to self-determination, solutions based on mutual agreement are rare and, therefore, very often solutions are either forced (Eastern Timor, Eritrea, Southern Sudan, Kosovo, etc.) or these conflicts transform into intractable ones. Therefore, for such conflicts, the solution of two challenges is urgent: the prevention of the recommencement of armed clashes and overcoming the intractability. Of course, the first challenge is unacceptable within the framework of international law. The unacceptability of the threat and/or use of force is one of the seven basic principles of international law defined by the Declaration and is obligatory for UN Member States. Moreover, the Declaration provides a comprehensive answer to the implementation of this principle at the time of self-determination conflicts:

‘Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.’⁷¹

Nevertheless, these norms are not sufficiently implemented yet due to the absence of proper response mechanisms. The role of such mechanisms for self-determination conflicts is to enable the international community to ensure the implementation of the people’s right to self-determination through the immediate recognition of independence in the case of commencement or recommencement of war. In self-determination conflicts, war tends to be started or re-started by the metropolis in order to maintain its rule over the self-determining territory.⁷² This is

⁷¹ Declaration on Principles of International Law concerning Friendly Relations... n.3 above.

⁷² C. Cox and J. Eibner, n.50 above.

P. W. Gor, *‘Tis some poor fello’s skull. Post-Soviet Warfare in the Southern Caucasus*, n.50 above.

especially true when we consider the fact that the military power and resources of a recognised state are always incomparably larger than those of the self-determining side, which has no motivation to wage a war. It is no coincidence that the same UN Declaration, alongside the principle of the equality of nations and right to self-determination has also defined the right to receive support from other states - especially for the self-determining side. It states that

‘(e)very State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.’⁷³

Ensuring the implementation of the right to self-determination in the case of the commencement or recommencement of war and immediate recognition of the independence of the self-determining people based on the outcome of a referendum on status by the international community will not only guarantee the implementation of international legal norms, but will also act as an operating preventive mechanism for the commencement or recommencement of war. This is an important resource of international law, the implementation of which will allow the resolution of a number of self-determination conflicts that have transformed into intractable conflicts, as well as preventing attempts to solve self-determination issues through war.

According to that approach,⁷⁴ this will happen when the conflict matures, i.e. the conflicting sides find themselves in a mutually hurting stalemate (MHS) and become convinced that the only way out is the proposed solution. It is not difficult to notice that this mechanism is of a forced nature, since in this case the sides do not reach a solution that is acceptable for them but, rather, reconcile with the proposed solution that is dictated by the situation. Thus, the Bargaining Paradigm is not applicable for finding solutions to intractable conflicts, and solution is possible only through forced mechanisms. But, unlike the case of the implementation of the Bargaining Paradigm, any solution that satisfies all sides is acceptable in cases of forced solution, though, in order to ensure its legality it is necessary that the solution lays within the framework of the international law (Legal Paradigm). Therefore, for self-determination conflicts which have turned into intractable conflicts it is necessary to change the resolution strategy.

I. King and W. Mason, *Peace at any Price*, n.50 above.

G. Starovoitova, *Sovereignty after Empire. Self-Determination Movements in the Former Soviet Union*. n.50 above.

⁷³Declaration on Principles of International Law concerning Friendly Relations... n.3 above.

⁷⁴ I.W. Zartman, *Negotiation and Conflict Management: Essays on Theory and Practice* (London and New York: Routledge Taylor & Francis Group, 2008), at 232.

First, the reasons that the Bargaining Paradigm has not worked out and the conflict has become intractable should be set aside (usually this is an issue of the status of the territory or related issues). Having solved these issues in the framework of international law (based on the Legal Paradigm), the Bargaining Paradigm can be employed for the remaining issues. Hence, in order to find solution to the conflicts that have become intractable, the mediators should reconsider the resolution strategy and organise it through three phases:

-Agenda: Classification of issues according to legal and political solutions and definition of the framework of the discussion of those issues.

-Legal: Discussion of issues that it is possible to solve within the framework of international law (the Legal Paradigm).

-Political: Discussion of issues that require mutual compromises (the Bargaining Paradigm).

In the first phase, not only should the Agenda issues be clearly defined, but, even more importantly, those issues for which international law has defined ways, principles and mechanisms of solution should be set aside. At the same time, the sequence of discussion of the issues and sequence of implementation of the solutions are of essential importance. It is apparent that the proposed three-phase approach can tangibly increase the efficiency of negotiations by reducing the number of ‘mutual compromise’ issues, since the main obstacle of the negotiations is the that sides attach different values to the solution of this or that issue. Moreover, if a legal solution is found for the implementation of determining objectives (the solution of key issues), the solution of other issues becomes tangibly easier. It is easy to notice that, in cases of the involvement of mediators from the point of view of conflict solution, their role is more useful in the first and second phases, since during these phases the possibility for mediating states to maneuver and push forward their own interests is quite limited. It is in the third, political phase that the approaches arising from the interests of the sides manifest themselves the most.

Conclusions

Since self-determination conflicts are often accompanied by armed clashes, the involvement of mediation for their regulation is almost inevitable. However, this increases the impact of the interests of mediating states over the regulation process when several powerful countries act as mediators. Since the main object of these conflicts concerns the status of self-determining

territory, quite often the sides do not find a mutually acceptable solution, while mediators acting with their own interests in mind avoid legal solutions which do not satisfy either of the sides, causing the resolution process to last for decades. Thousands of people who have already suffered heavy losses in the outcome of armed clashes are being subjected to new ordeals - rights violations, difficult social-economic conditions, danger of new clashes. In order to overcome this crisis situation, a new three-level paradigm is being proposed, taking full advantage of the opportunities provided under the norms of international law. From the aspect of the regulation of self-determination conflicts, international law is clear and complete. It provides the only opportunity for the legal and fair resolution of such conflicts and for overcoming the challenge of political interests.